IN THE

Supreme Court of the United States

October Term, 1976

No. 77-196

GENERAL FINANCE CORPORATION,
Petitioner,

v.

JOHN C. POLLOCK AND BARBARA POLLOCK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

General Finance Corporation ("GFC"), Petitioner, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on July 16, 1976, rehearing denied, May 27, 1977, confirming the judgment of the United States District Court for the Northern District of Georgia, entered on March 26, 1975, adopting the Recommendations of a Special Master for the U.S. District Court for the Northern District of Georgia, filed on February 28, 1975.

I. OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit to which this petition is addressed is reported at 535 F.2d 295 and also appears at page A-2 of the Appendix to this Petition. The Court of Appeals' order denying GFC's petition for a rehearing is reported at 552 F.2d 1142 and appears at page A-9 of the Appendix.

The order of the United States District Court for the Northern District of Georgia approving the Recommendations of the Special Master that was the subject of GFC's appeal to the Court of Appeals is unreported but appears at page A-14 of the Appendix.

The Recommendations of the Special Master for the United States District Court for the Northern District of Georgia upon which the District Court entered its order are unreported but appear at page A-16 of the Appendix.

II. JURISDICTIONAL STATEMENT

The order of the Court of Appeals denying rehearing was entered on May 27, 1977. This Court has jurisdiction to hear the Petition under 28 U.S.C. § 1254(1), and the Petition has been filed in the time required by 28 U.S.C. § 2101(c).

III. QUESTIONS PRESENTED FOR REVIEW

1. Whether the Board of Governors of the Federal Reserve System ("Board") has the authority under the Federal Truth in Lending Act to promulgate regulations which obviate ambiguous provisions of that Act and facilitate compliance therewith.
2. Whether a disclosure made by a creditor in strict conformity with Regulation Z promulgated by the Board pursuant to the Truth in Lending Act can be held to constitute a violation of that Act.
3. Whether a creditor which complied with Regulation Z promulgated by the Board pursuant to the Truth in Lending Act can be held liable for civil penalties for violation of that Act.
4. Whether the Board has the authority to administer the Truth in Lending Act through staff Public Information Letters interpreting the provisions of Regulation Z, which the Board promulgated pursuant to that Act.

5. Whether Public Information Letters issued by the Board's staff, which consistently interpret a provision of Regulation Z to have a given meaning, are entitled to great weight and are to be the controlling interpretation of regulatory meaning.
6. Whether the last sentence of § 226.8(b)(5) of Regulation Z, 12 C.F.R. § 226.8(b) (5), which has no statutory counterpart but was promulgated by the Board under its broad rulemaking authority, requires creditors to inform borrowers that, pursuant to state law, any consumer goods acquired within ten days after a loan transaction were subject to a security interest under that transaction and that any consumer goods acquired after that date were not subject, notwithstanding a staff Public Information Letter to the contrary.
7. Whether the last sentence of § 226.8(b) (5) of Regulation Z, 12 C.F.R. § 226.8 (b) (5), which has no statutory counterpart but was promulgated by the Board under its broad rulemaking authority, requires creditors to inform borrowers that, pursuant to state law, future indebtedness is secured by all consumer goods acquired by the borrower within ten days of the creditor's having given value for the future indebtedness and that no security interest was retained in consumer goods acquired after that ten day period, notwithstanding a staff Public Information Letter to the contrary.

IV. STATUTES AND REGULATIONS INVOLVED

The Truth in Lending Act, 15 U.S.C. §§1601, *et seq.*, and Regulation Z, 12 C.F.R. Part 226, promulgated by the Board pursuant to that Act are principally involved. The specific sections of the Act involved are §§ 102(a); 105; 106(b), (c), (d), and (e); 111; 121(a); 129(a) (1), (2), (3), and (8); and 130(f) (15 U.S.C. §§ 1601(a); 1604; 1605(b), (c), (d), and (e); 1610; 1631(a); 1639(a) (1), (2), (3), and (8); and 1640 (f)), and the specific sections of Regulation Z involved are § 226.1(a) (2); §§ 226.4(a) (6) and (7), (b), (c), (d), and (e);

§ 226.6(c); and §§ 226.8(b)(5) and (d)(1) of Regulation Z (12 C.F.R. § 226.1(a)(2); §§ 226.4(a)(6) and (7), (b), (c), (d), and (e); § 226.6(c); and §§ 226.8(b)(5) and (d)(1)). The pertinent provisions of the Act and Regulation appear at pages A-22 to A-31 of the Appendix.

V. STATEMENT OF THE CASE

Respondents brought this action in the United States District Court for the Northern District of Georgia, alleging that Petitioner, GFC, a financial institution, had violated the Act and Regulation Z. Original jurisdiction in the United States District Court was thus conferred by § 130(e) of the Act, 15 U.S.C. § 1640(e).

The consumer credit transaction upon which this suit was brought was an instalment loan entered into by Respondents and Petitioner on September 12, 1973 in the amount of $171.36. Inasmuch as that transaction involved an extension of consumer credit other than open end, Petitioner furnished to Respondents the disclosures required by 15 U.S.C. § 1639(a) and 12 C.F.R. §§ 226.8(b) and (d). The required disclosures were made on the note evidencing the obligation, a copy of which was given to Respondents along with a copy of the security agreement which they also executed in connection with the transaction. Conformed copies of the note and security agreement appear at page A-41 of the Appendix.

The case was heard by a Bankruptcy Judge sitting as a Special Master for the United States District Court for the Northern District of Georgia on a motion for summary judgment. The Special Master filed his Recommendations for judgment in favor of Respondents on the grounds that—

1. GFC failed to itemize the amount of the check given to Respondents as proceeds of the loan, after deducting the amount of the premiums for voluntary credit life and disability insurance (which were

itemized) from the disclosed "amount financed," all in violation of 15 U.S.C. § 1639(a) (1) and 12 C.F.R. § 226.8(d) (1);

2. GFC failed to disclose properly that Respondents' after-acquired property will be subject to GFC's security interest; and

3. GFC failed to disclose properly that Respondents' future indebtedness to GFC will be secured by GFC's security interest.

GFC's disclosure statement furnished to Respondents disclosed the "amount financed" as $171.36 as well as voluntary credit life and credit disability insurance premiums of $3.84 and $12.24, respectively. The net amount of the check paid to Respondents after deducting the aggregate amount of those premiums from the "amount financed" ($155.28) was shown without a label or description.

GFC relied on the provisions of 12 C.F.R. § 226.8(d) (1) which does not require disclosure of net loan proceeds; it only requires disclosure of the "amount financed" and itemization of "all charges . . . which are included in the amount of credit extended but which are not part of the financial charge."[1] Inasmuch as the net disbursement to the borrowers of the proceeds of the loan after deducting optional and voluntary insurance premiums are not "charges," of the type which may be excluded from the financial charge under 12 C.F.R. § 226.4,[2] GFC did not

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[1]Appendix, p. A-29.

[2]Excludable "charges" under that section of Regulation Z relate to expenses incurred in connection with a consumer credit transaction, such as premiums for optional and voluntary credit life and disability insurance; fees for perfecting a security interest; license, title, and registration fees; and title examination fees. § 106(b),(c),(d), and (e) of the Act, 15 U.S.C. § 1605(b),(c),(d), and (e); 12 C.F.R. §§ 226.4(a)(6) and (7) and 12 C.F.R. §§ 226.4(b),(c),(d), and (e); Appendix, pp. A-22 and A-26.

individually itemize (*i.e.*, describe) the net proceeds. GFC also relied on the Board's Public Information Letter No. 271[3] holding that the proceeds of a loan, after deducting charges incurred in connection with the loan that are not part of the financial charge, need not be itemized.

Whether the credit life and credit disability insurance were optional and voluntary was never an issue in the case; however, Respondents did allege a violation in connection with disclosure of the term of such insurance. As to that claim, the Special Master found for GFC, and the issue was not raised on appeal.

With respect to after-acquired property, the only security interest taken was in "household and consumer goods,"[4] and GFC's disclosure statement indicated that the security agreement "may" cover such property. GFC used the word "may" in its disclosure ststement, because Georgia had adopted the Uniform Commercial Code,[5] which limits a security interest in after-acquired consumer goods to such goods acquired by the obligor within a period of ten days after the secured party gives value.[6] Thus, after-acquired consumer goods literally *may* (or *may not*) be subject to the security agreement, depending upon when they are acquired by the obligor.

The Special Master found a violation of the after-acquired property disclosure, however, because the security agreement described the secured property as "household and consumer goods . . . now or hereafter located in

[3]CCH, *Consumer Credit Guide*, Par. 30,522; Appendix, p. A-31.

[4]Appendix, p. A-41.

[5]Ga. Code Ann., §§ 109A-1, *et seq.*

[6]Ga. Code Ann., § 109A-9-204(4)(b); Appendix, p. A-30.

or about the premises constituting the Debtor's residence."[7] According to his Recommendations, failure to disclose that a security interest "will" be retained in after-acquired property was a violation, notwithstanding that under State law, consumer goods acquired more than ten days after GFC's having given value *will not* be so subject.

With respect to the security interest for future indebtednesses, it should be carefully noted that the most logical interpretation and, it is submitted, the intended meaning of the provisions of the last sentence of 12 C.F.R. § 226.8(b)(5) impose the obligation to disclose the security interest on future indebtedness *only* as it relates to after-acquired property. That sentence provides that "[i]f after-acquired property will be subject to the security interest, or if other or future indebtedness is *or may be* secured by *any such property*, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired"[8] (emphasis supplied). Thus, the security interest for future indebtedness need be disclosed *only* as that security interest "may" relate to after-acquired property.

GFC's disclosure relating to future indebtedness provided that any property which secured the current loan "may" secure future or other indebtedness. Again, GFC used the word "may" in its diclosure statement, because the only security interest taken was in consumer goods, and the provisions of the Uniform Commercial Code as adopted in Georgia limit any such security interest in consumer goods to only such goods as are acquired by the obligor within ten days after the obligee's having given value for the future indebtedness. Although GFC's security agreement was not conditional with respect to consumer goods acquired more than ten days after giving

[7]Appendix, p. A-41.

[8]Appendix, p. A-29.

value on future indebtedness, Georgia law under which the security agreement is enforced was conditional. Moreover, the security agreement was, in fact, conditional in that it stipulated that the security interest would not apply to any property for future indebtedness incurred after the current indebtedness had been paid in full. Thus, GFC's disclosure that the loan *may* secure future or other indebtedness was, quite literally, true. However, the Special Master found that use of the word "may" instead of the word "will' in GFC's disclosure relating to the security interest for future indebtedness was a violation.

In affirming the lower court's judgment with respect to itemization of the net proceeds of the loan after deducting charges for optional and voluntary credit insurance, the Court of Appeals found that although the "literal language of the regulation"[9] does not require itemization, the statute imposed different requirements. In short, the Court of Appeals found that 15 U.S.C. § 1639(a) required disclosure (itemization) of the net proceeds of the loan, although the provisions of 12 C.F.R. § 226.8(d)(1) implementing that section of the Act did *not* require itemization.

In affirming the holding of the lower court relating to the security interest in after-acquired property, the Court of Appeals arrived at the same conclusion as the District Court -- that there had been a violation -- but for different reasons. The Court of Appeals interpreted 12 C.F.R. § 226.8(b)(5) as requiring a lender, in its Truth in Lending disclosures, "to explain the 10 day limitation"[10] under the Uniform Commercial Code.

With respect to future indebtedness, the Court of Appeals found that the phrase "any such property" in the

[9]Appendix, p. A-5.

[10]Appendix, p. A-7.

last sentence of 12 C.F.R. § 226.8(b)(5) referred to "after-acquired property," and for that reason, lenders were required to disclose affirmatively the ten day limitation on the security interest in consumer goods for future indebtedness.

In denying the petition for rehearing, the Court of Appeals specifically reaffirmed its holding that the Truth in Lending Act requires a creditor to make a labeled disclosure of net loan proceeds, notwithstanding the "more natural reading of § 226.8(d)(1)"[11] of Regulation Z to the contrary.

The Court of Appeals also reaffirmed without modification its holding that a creditor must disclose the ten-day limitation on a security interest in after-acquired consumer goods. However, in reaffirming its position on disclosure of a security interest for future indebtedness, the Court of Appeals changed its interpretation of the proper meaning of the phrase "any such property" in the last sentence of 12 C.F.R. § 226.8(b)(5), holding that that phrase referred to "property to which the security interest relates" in the first sentence of that paragraph -- an interpretation which breaks every rule of grammatical construction.

The matter of immunity from civil liability for good faith reliance on the Board's regulation was first raised in the petition for rehearing. Section 408(e) of the Depository Institutions Amendments Act of 1974[12] added a new subsection (f) to 15 U.S.C. § 1640 which provides that no civil liability " . . . shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board."[13] Moreover, that

[11]Appendix, p. A-11.

[12]Act of October 28, 1974, Pub. L. No. 93-495.

[13]Appendix, p. A-25.

defense was specifically made available in any case wherein review was still available, "whether by appeal or otherwise." Although the Court of Appeals found that GFC's assertion of the defense on petition for rehearing was timely, it refused to rule whether that defense against civil penalties for failure to itemize the proceeds of the loan was available to GFC on the basis that violations relating to disclosure of the security interest in after-acquired property and in connection with future in debtedness justified the imposition of the civil penalties.

VI. REASONS FOR GRANTING THE WRIT

1. The Court below has struck down the broad regulatory authority of the Board of Governors of the Federal Reserve System under the Truth in Lending Act in direct conflict with an applicable decison of this Court.

The judgment below would strike down and render null the broad regulatory authority of the Board of Governors of the Federal Reserve System ("Board") under the Act. Section 105 of the Act, 15 U.S.C. § 1604, specifically authorizes the Board to include in its regulation ". . . such judgments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper . . . to facilitate compliance [with the Act]."[14] Furthermore, 15 U.S.C. § 1631(a) requires that each creditor " . . . shall disclose clearly and conspicuously, in accordance with the regulations of the Board."[15]

This Court, in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), confirmed the Board's authority to extend by regulation the coverage of the Truth in Lending Act to transactions payable in more than four instalments where no separate finance charge was imposed. There, the Court made the following observation:

> To accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to *entrust its construction* to an agency with the necessary experience and resources to monitor its operation. Section 105 delegated to the Federal Reserve Board broad authority to promulgate regulations necessary to render the Act effective. (411 U.S. at 365) (emphasis supplied)

Mourning, supra, dealt with the Board's authority to promulgate regulations "to prevent circumvention or evasion" of the Truth in Lending Act. In reversing the Court of Appeals for the Fifth Circuit in *Mourning, supra*, the Court said:

> [W]e cannot agree with the conclusion of the Court of Appeals that the Board exceeded its authority in promulgating the Four Installment Rule. Congress was clearly aware that merchants would evade the reporting requirements of the Act by concealing credit charges. In delegating authority to the Board, Congress emphasized the Board's authority to prevent such evasion. To hold that Congress did not intend the Board to take action against this type of manipulation would require us to believe that, despite this emphasis, Congress intended the obligations established by the Act to be open to evasion by subterfuges of which it was fully aware. As in *Gemsco*, the language of the enabling provision precludes us from accepting so narrow an interpretation of the Board's power. (411 U.S. at 371)

The rulemaking authority of the Board under § 105 of the Act, 15 U.S.C. § 1604, is not limited to preventing circumvention or evasion. It extends equally to authority to "facilitate compliance" with the Act. In the case at bar, the wisdom of Congress in granting to the Board such a broad delegation of authority is vindicated. As written, 15 U.S.C. § 1639(a) contains the following internal inconsistency:

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[14] Appendix, p. A-22.

[15] Appendix, p. A-24.

- Paragraph (1) requires disclosure, *inter alia*, of the "amount of credit . . . which is or will be paid . . . to another person on his [obligor's] behalf,"[16] which in the case at bar is the aggregate amount of the voluntary and optional credit insurance premiums deducted from the "amount financed" on the borrower's instructions and paid to the insurer on the borower's behalf;
- Paragraph (2) requires disclosure of "all charges individually itemized which are included in the amount of credit extended but which are not part of the finance charge,"[17] which in the case at bar are the respective amounts of the same credit insurance premiums; and
- Paragraph (3) requires disclosure of "the sum of the amounts referred to in paragraph (1) plus the amounts referred to in paragraph (2),"[18] thus including the amount of the insurance premiums twice in the amount financed.

Premiums on optional and voluntary credit insurance of the type involved in the case at bar clearly are a part of the credit paid to another person -- under Georgia law,[19] to or on behalf of an agent licensed by the insurance commissioner -- on the obligor's behalf.

Thus, as written, 15 U.S.C. § 1639(a) imposes the absurd requirement that, in any transaction involving "charges" which are included in the amount financed and are excluded from the finance charge, the amount of such

[16]Appendix, p. A-24.

[17]Appendix, p. A-24.

[18]Appendix, p. A-25.

[19]Ga. Code Ann., § 24-315(c).

"charges" be included twice in computing the amount financed. And absurd consequences are never presumed. *Kreitlein v. Fergen*, 238 U.S. 21 (1915); *United States v. Kirby*, 7 Wall. 482 (1869). Moreover, including such charges twice in computing the disclosed amount financed would frustrate the purpose of the Act, which is to assure a "meaningful disclosure of credit terms."[20]

In drafting Regulation Z, the Board recognized the internal inconsistency in the Act, and in 12 C.F.R.§ 226.8(d)(1) simply required disclosure of the "amount financed" and all other charges, individually itemized, which are included in the amount of credit extended but which are not part of the financial charge.[21] And the Board has consistently held that that provision of the Regulation does not require itemization of cash proceeds of a loan.

In explaining its reason for drafting the Regulation as it now stands, the Board in its brief as *Amicus Curiae* in support of defendant-appellant's petition for rehearing in the Court below explained that the " . . . Regulation eliminates the possibility that certain 'charges' will be counted twice in arriving at the 'amount financed'."[22]

The Court of Appeals saw no such internal inconsistency in the statute, observing that 15 U.S.C. § 1639(a)(1) referred to "consolidation loan payments and the like;" 15 U.S.C. § 1639(a)(2) referred to "incidental charges such as credit insurance;" and 15 U.S.C. § 1639(a)(3) required the summation of the two.[23]

[20]15 U.S.C. § 1601(a); Appendix, p. A-22.

[21]Appendix, p. A-29.

[22]Brief for *Amicus Curiae* at 9, *Pollock v. General Finance Corporation*, 552 F.2d 1142 (5th Cir. 1977).

[23]Appendix, p. A-25.

This provision in the Board's Regulation became effective on July 1, 1969, the effective date of the Act, and has never been amended. It reflects the Board's judgment as to the manner in which the Act's mandates and purposes would be most effectively implemented. As such, the Regulation is a "contemporaneous construction" of the Act and is entitled to great deference. In *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396 (1961), the Court stated "[p]articularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction' of a statute by the men charged with the responsibility of setting its machinery in motion, making the parts work efficiently and smoothly while they are yet untried and new." (367 U.S. at 408). Accord, *Udall v. Tallman*, 380 U.S. 1 (1965).

In *Mourning, supra*, the Court made the following additional observations: "That some other remedial provision might be practicable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority." (411 U.S. at 371).

Courts are not generally free to substitute their own discretion for that of an administrative agency that has kept within the bounds of its powers, unless the rules of that agency are " . . . the expression of a whim rather than an excercise of judgment."[24] Such is clearly not the case here. "Whim" is defined as a "capricious or eccentric idea, notion, or vagary usu., occurring suddenly or spontaneously."[25] It is submitted that the Board's Regulation which resolves what an experienced administrative agency perceives to be an internal inconsistency in the statute cannot by any stretch of semantic imagination be considered a "whim."

[24] *American Telephone & Telegraph Co. v. United States*, 299 U.S. 232, 236 (1936).

Not only is the Regulation to be accorded great deference because it is a "contemporaneous construction" of the statute, but also because Congress has reviewed the statute a number of times and amended it at least five times[26] without reversing the Board's Regulation. Thus, it may be presumed that the Regulation reflects congressional intent.

A case directly in point is *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267 (1974). That case involved the question of whether the National Labor Relations Act ("NLRA"), as amended by the Taft-Hartley Act, excludes "managerial employees" from the protection of NLRA. The Wagner Act (the original NLRA) did not expressly mention the term "managerial employee" but the National Labor Relations Board created that category by regulation as one which may not be included in a bargaining unit with rank-and-file employees. The Taft-Hartley amendments created several other categories of excluded employees but did not specifically mention "managerial employees." In holding that Congress intended to exclude "managerial employees" from the protection of NLRA, the Court said:

> [A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where the

[25] *Webster's Third New International Dictionary* (Springfield, Mass: G. & C. Merriam Company (1961)).

[26] Act of October 26, 1970, Pub.L. 91-508; Act of October 28, 1974, Pub.L. 93-495; Act of January 2, 1976, Pub.L. 94-205; Act of February 27, 1976, Pub.L. 94-222; Act of March 23, 1976, Pub.L. 94-240.

> Congress has re-enacted the statute without pertinent change. *In these circumstances, Congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.* (416 U.S. at 274) (emphasis supplied)

Accord, *Red Lion Broadcasting Co. v. Federal Communications Commission, et al.*, 395 U.S. 367, 381 (1969); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); and *National Labor Relations Board v. Boeing Co., et al.*, 412 U.S. 67, 75 (1973).

Three of the five amendments to the Act passed since the Board promulgated 12 C.F.R. § 226.8(d)(1) have dealt specifically with the Board's regulatory authority by extending and enhancing it, not by restricting or otherwise diminishing it. And none of those laws have revised, repealed, or otherwise altered 12 C.F.R. § 226.8 (d)(1). Under the foregoing authorities, the conclusion is inescapable that Congress intended the Board's Regulation to stand. This Court should affirm the Board's authority to promulgate such a Regulation and should affirm the efficacy of that Regulation as promulgated.

2. The judgment in this case is in total disregard of, and direct conflict with, § 121(a) of the Truth in Lending Act, 15 U.S.C. § 1631(a).

Courts are not free to disregard the clear mandate of a duly enacted statute.

> In the construction of statutes, the courts start with the assumption that the legislature intended to enact an effective law, and the legislature is not to be presumed to have done a vain thing in the enactment of a statute.
>
> * * *
>
> An interpretation should, if possible, be avoided under which the statute or provision being construed is defeated, explained away, or rendered insignificant,

> meaningless, inoperative or nugatory. (73 Am.Jur.2d, Statutes, § 249)

Accord, *Armstrong Paint and Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315 (1938); *Crowell v. Benson*, 285 U.S. 22 (1932); *Graham v. Goodcell*, 282 U.S. 409 (1931); and *Imperial Production Corp. v. Sweetwater*, 210 F. 2d 917 (5th Cir. 1954).

Section 121 (a) of the Act, 15 U.S.C. § 1631 (a), imposes the *obligation* that creditors "shall disclose . . . in accordance with the regulations of the Board."[27] Moreover, § 503 of the Consumer Credit Protection Act, 83 Stat. 167, which sets out the rules of grammatical usage for the Act, provides that "[t]he word 'shall' is used to indicate that an action is both authorized and *required*." (emphasis supplied).

Thus, the use of the word "shall" in 15 U.S.C. § 1631 (a) indicates that Congress intended that the Board's Regulations be the last word in determining disclosures. The clear purpose of this provision is to give creditors the certainty that if they comply with the disclosure requirements of the Board's Regulations, they will have made all the disclosures required by law. Following this statutory mandate the Board drafted Regulation Z ". . . in a form that would serve not only as a legal directive for implementing the Act, but also as an operating handbook."[28]

It is not at issue here whether GFC complied with Regulation Z; clearly it did. In fact, that is the precise reason it was cast in judgment on this issue: it complied to the letter with the Board's Regulation.

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[27] Appendix, p. A-24.

[28] Board of Governors of the Federal Reserve System, Annual Report to Congress on Truth in Lending for the Year 1969, January 3, 1970, at 2.

A creditor's rights and obligation to rely upon the Board's Regulations and other authoritative interpretations have twice been reaffirmed and expanded by Congress. In 1974, Congress amended the civil liability provisions of the Act[29] specifically to provide that a creditor may not be held liable for either civil or criminal penalties for any act done or omitted in good faith in reliance on any rule, regulation, or interpretation of the Board, even if the rule, regulation or interpretation is subsequently amended, rescinded, or determined by judicial or other authority to be invalid for any reason. The Act was amended in 1976[30] to permit creditors to rely upon interpretations or approvals of officials of the Board's staff who have been duly authorized by the Board to issue such interpretations or approvals.

It is apparent from this statutory structure, particularly in view of the requirements of 15 U.S.C. § 1631 (a), that Congress intended that creditors must look to the Board's Regulations for instruction and guidance on how to make disclosures, and, similarly, that creditors are able to rely upon the Board's Regulations in making those disclosures. That intent should be confirmed by this Court.

3. The judgment in this case leaves in substantial doubt the authority of the Board of Governors of the Federal Reserve System to administer the highly technical provisions of the Truth in Lending Act with precision and certainty for the benefit of all persons subject to the Act.

Congress made it abundantly clear that the Board of Governors of the Federal Reserve System was to have broad authority to institute and maintain uniform administration of the Act for all types of credit in all parts of

[29]Act of October 28, 1974, Pub.L. 93-495.

[30]Act of February 27, 1976, Pub.L. 94-222.

this Nation. H.R. 11601, 90th Cong., 1st Sess. (1967), was the Truth in Lending bill which passed the United States House of Representatives and was referred to the Committee of Conference to be reconciled with a similiar Senate bill, S. 5, 90th Cong., 1st Sess. (1967). The delegation of regulatory authority to the Board in H.R. 11601 survived almost verbatim in 15 U.S.C. § 1604.[31] Accordingly, it is appropriate to look at the legislative history of this provision in order to ascertain legislative intent and to confirm the literal meaning of the language used in the Act. *Addison, et al. v. Holly Hill Fruit Products, Inc.*, 232 U.S. 607 (1944); *United States v. Public Utilities Commission of California, et al.*, 345 U.S. 295 (1953); *United States v. Bryan*, 339 U.S. 323 (1950).

The Report of the Committee on Banking and Currency, House of Representatives, to accompany H.R. 11601[32] makes very clear this congressional intent to confer broad regulatory authority:

> All substantive regulations in connection with the full disclosure of the terms and conditions of finance charges in credit transactions or in the advertisement of credit transactions shall be issued by the Board of Governors of the Federal Reserve System. *No one can deny their experience and expertise in these matters.* Accordingly, it is the view of your committee that, for the uniformity of application to all affected segments

[31]Section 204(c) of H.R. 11601, *supra*, as reported to the House of Representatives by the Committee on Banking and Currency provided as follows:

> "Any regulation prescribed under this section may contain such classifications and differentiations and may provide for such adjustments and exceptions for any class of transactions as in the judgment of the Board are necessary or proper to effectuate the purposes of Section 203 or prevent circumvention or evasion thereof, or to facilitate compliance by creditors with Section 203 or any regulation issued under this section."

[32]H.R. Rep. No. 1040, 90th Cong., 1st Sess. (1967).

of the industries concerned, a single set of comprehensive regulations should be issued.

* * *

The Board of Governors of the Federal Reserve System is to be the central, single agency for *issuing all regulations on credit disclosure* or on the advertising of credit to insure a single set of overall standards applicable to all forms of consumer credit . . . . (at 18-19) (emphasis supplied)

The 93rd Congress reviewed and reenforced this administrative authority. Title II of S. 2101,[33] the Truth in Lending Amendments which eventually became law as part of the Depository Institutions Amendments Act of 1974, *supra*, upgraded creditors' protection by providing immunity from civil and criminal liability for any act done or omitted in good faith in conformity with any rule, regulation, or interpretation of the Truth in Lending Act by the Board. In the Report of the Committee on Banking, Housing and Urban Affairs, United States Senate, to accompany S. 2101,[34] the Committee referred to the Truth in Lending Act as being "highly technical" (at 13) and subject to "hyper-technical litigation" (at 14), and thus enhanced the Board's rulemaking authority so that a creditor could not be forced ". . . to choose between the Board's construction of the Act and the creditor's own assessment of how the court may interpret the Act" (at 13).

Thus, there is presented in the case at bar an important question of Federal law which has not been, but should be, settled by this Court: § 105 of the Act, 15 U.S.C. § 1604,

[33]93rd Cong., 2nd Sess. (1974).

[34]S. Rep. No. 93-278, 93rd Cong., 1st Sess. (1973).

gives the Board broad authoirty to promulgate regulations which "facilitate compliance" with the Act;[35] § 130 of the Act, 15 U.S.C. § 1640(f), contemplates that courts shall have the authority to hold such regulations to be "invalid;"[36] and yet § 121(a) of the Act, 15 U.S.C. § 1631 (a), contains the unqualified mandate for the creidtors to make disclosures "in accordance with the regulations of the Board."[37] This internal inconsistency was not addressed directly by the Court of Appeals, thus leaving in substantial doubt the Board's authority to administer the Act. It should be resolved by this Court.

4. The Court of Appeals decided that the Federal Truth in Lending Act mandates detailed disclosure of the creditor's rights and duties under state laws, and that any right asserted in the contract by the creditor which was not premitted by state law would constitute a violation of the Truth in Lending Act, if the disclosures agreed with the contract. This is an important question of Federal law which has not been, but should be, settled by this Court.

In *Pennino v. Morris Kirschman & Co., Inc.*, 526 F. 2d 367 (5th Cir. 1976), the court held that ". . . the Act does not require a creditor to narrate the law of the forum state but requires simply a meaningful disclosure of the credit terms he *intends* to charge" (at 371; emphasis supplied). Thus, *Pennino* only requires the creditor to disclose the rights he claims in his contract. However, the decision of the same court in the case at bar requires a creditor to disclose only those rights he can assert consistent with state law, irrespective of the terms he intends to impose.

[35]Appendix, p. A-22.

[36]Appendix, p. A-25.

[37]Appendix, p. A-24.

This dichotomy is best illustrated by the decision in *Pinkett v. Credithrift of America, Inc., No. 2*, 430 F. Supp. 113 (N.D.Ga. 1977) in which the court laid out its dilemma as follows:

> This court originally attempted to reconcile *Pennino* with the *Pollock* doctrine . . . In retrospect, this court finds such reconciliation unconvincing; *Pennino* and *Pollock* stand on opposing principles. *Pennino* only requires the creditor to disclose the rights he claims in his note, while *Pollock* requires him to disclose only those rights he can assert consistent with state law. The Special Master urges this court to follow *Pollock*, the more recent pronouncement, but the court believes that *Pennino* sets the better course . . . . (430 F.Supp. at 117)

The case at bar is the later of the two cases in conflict; yet, in its opinion, the Court of Appeals did not specifically overrule the earlier *Pennino* decision. Accordingly, all of the District Courts within the Fifth Circuit, which are, presumably, bound by both the *Pennino* and *Pollock* decisions, find themselves in the dilemma of deciding which is a proper statement of the requirements of the Act. Creditors and consumers face that same dilemma.

The need for certainty under the Truth in Lending Act and Regulation Z is particularly important in the United States Court of Appeals for the Fifth Circuit. During the last four fiscal years reported (1973 through 1976), 55.57% of all Truth in Lending cases filed in U.S. District Courts were filed in District Courts under the jurisdiction of the Fifth Circuit.[38] Thus, it is all the more important that the conflict between two decisions of that Court of Appeals be resolved by this Court.

That conflict brings into sharp focus an important

[38]ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1976, (Washington: U.S. Government Printing Office, 1977) at 200.

questions of Federal law which has not been, but should be, settled by this Court: Does the Truth in Lending Act require a creditor to disclose the rights that a creditor *claims* in the contract documents, or does the Act require the creditor to disclose only those rights which may be *asserted* under state law?

Both the Act and Regulation Z are clear in this regard. Section 111 of the Act, 15 U.S.C. § 1610,[39] specifically leaves the matter of the validity and enforcement of any contract to applicable state law. Moreover, the Act does not annul, alter, or affect the scope or applicability of state law. Thus, the Congress was clearly leaving the substantive provisions of state law and the enforcement of state law to state authority, reserving to Federal law only the disclosures clearly required by the Act.

The Board properly interpreted this congressional intent in Regulation Z where it provided that "[n]either the Act not this Part is intended to control charges for consumer credit, or to interfere with trade practices except to the extent that such practices may be inconsistent with the purposes of the Act."[40] Furthermore, 12 C.F.R. § 226.6 (c) permits, but does not require, creditors to supply "additional information or explanations," including "any provision of State law."[41] Thus, both Congress and the Board have left disclosure and enforcement of the substance of state contract law where it belongs—with the states. Disclosure is permitted, but not required.

The unintended complexity which will surely result if the Court of Appeals in the case at bar is not reversed is

[39]Appendix, p. A-24.

[40]12 C.F.R. § 226.1(a)(2); Appendix, p. A-25.

[41]Appendix, p. A-28.

best described in the opinion in *Pinkett v. Credithrift of America, Inc., No. 2, supra:*

> The [Truth in Lending] Act does not give the consumer the right to know all the creditor's rights and duties under state law. If the terms of the credit agreement violate that law, the consumer is free to resort to remedies provided by the state . . . [I]f the Congress wanted it any other way, it would have said so. But if this court were to follow *Pollock* to its logical conclusion, the result would be the opposite: all notes which violated state law in the various areas pertinent to the Act would automatically give rise to a violation of the Act if the disclosure statements were consistent with the note.
>
> Enforcement of this laudable Act has become confusing enough, without engrafting onto it the laws of the fifty states . . . [A] faithful adherence to *Pollock* can rapidly lead the courts astray. (430 F.Supp. at 117-18)

Because of this complexity, the Board has been quite consistent in minimizing the requirements relating to disclosure of the terms of state contract law in its interpretations of the Act and Regulation Z. For example, even though 12 C.F.R. § 226.8 (b) (5) requires a "clear identification of the property"[42] to which a security interest relates, the Board has consistently held that a reasonable short-form disclosure was permissable. The Board's Public Information Letters No. 509 and 521[43] permit reference to "common stock" and "household goods," respectively, rather than requiring a detailed listing of each item of collateral.

Thus, the Board charted the course toward reasonable and commercially feasible interpretation of the Act and

[42]Appendix, p. A-29.

[43]CCH, *Consumer Credit Guide*, Par. 30,712 and Par. 30,727; Appendix, pp. A-32 and A-34.

Regulation, a course which is reflected in the Recommendations of the Special Master adopted by the District Court in *Burrell v. City Dodge, Inc.*, (No. 18739, N.D.Ga., June 21, 1974)[44] that "Regulation Z does not require a lender to give the consumer a short course in commercial transactions," and in the later opinion of the Court of Appeals for the Fifth Circuit in *Pennino, supra*, that ". . . the Act does not require a creditor to narrate the law of the forum state." (526 F.2d at 371).

More recently, the Board reaffirmed its position that disclosure of the "type" of the security interest retained or acquired may be made very generally. In Official Staff Interpretation FC-0023[45] issued pursuant to the amendment to 15 U.S.C. § 1640 (f) made by Public Law 94-222, the Board held that the requirement of 12 C.F.R. § 226.8 (b)(5) relating to disclosure of the "type" of security interest is satisfied by disclosure of a "security interest under the Uniform Commercial Code," saying that the Regulation does not require a detailed statement of the type of security interest or a citation to any specific statutory provision.

The Board has taken a parallel position regarding the meaning of the after-acquired property disclosure in 12 C.F.R. § 226.8 (b) (5). The Board's Public Information Letter No. 983[46] holds that disclosure of the *fact* that after-acquired property will be subject to the security interest is sufficient to comply with the Regulation.

Public Information Letter No. 1053[47] reemphasized and

[44]CCH, *Consumer Credit Guide*, Par. 98,764, p. 88,385, 88,388.

[45]41 *Federal Register* 52981; Appendix, p. A-38.

[46]CCH, *Consumer Credit Guide*, Par. 31,323; Appendix, p. A-35.

[47]CCH, *Consumer Credit Guide*, Par. 31,395; Appendix, p. A-37.

further clarified the Board's intent with respect to the requirements of Regulation Z relating to the disclosure of the security interest in after-acquired property, holding specifically that disclosure of the ten-day limitation under § 9-204 of the Uniform Commercial Code was *not* required for Truth in Lending purposes. Inasmuch as Georgia has enacted the pertinent provisions of that section of the U.C.C. intact,[48] the decision of the Court of Appeals on this point of law should be reversed.

Furthermore, a disclosure that after-acquired property "will" be subject to a security interest when, in fact, such property acquired more than ten days after consummation will *not* be so subject would be "inaccurate and misleading in violation of Regulation Z," Public Information Letter No. 1053, *supra.*

Similarly, the decision of the Court of Appeals with respect to the disclosure of the fact that future indebtedness would be secured by the security agreement is at odds with the rationale of the foregoing Public Information Letters. The better reading—indeed, the only grammatically sound reading—of 12 C.F.R. § 226.8(b)(5) imposes the obligation on creditors to disclose the security interest on future indebtedness *only* as it relates to after-acquired property. Thus, in the case at bar the security for future indebtedness need by disclosed *only* as that security might relate to after-acquired consumer goods.

The Board's Public Information Letters indicate clearly that ". . . a simple disclosure of the fact that after-acquired property may be subject to the security interest would be sufficient," Public Information Letter No. 1053, *supra.* Both logic and equity demand a parallel construction for the disclosure of the security interest in consumer goods for future indebtedness.

Not only have the courts consistently upheld the Board's

[48]Ga. Code Ann., § 109A-9-204(4)(b); Appendix, p. A-30.

regulatory authority, they have also consistently held that the Board's interpretations and staff opinions are entitled to great weight in interpreting the Truth in Lending Act and Regulation Z. In *Philbeck v. Timmers Chevrolet, Inc., et al.*, 499 F.2d 971 (5th Cir. 1974), the court said

> [W]e deal primarily with four sources of law and interpretation: the Truth in Lending Act itself; Regulation Z, which was promulgated by the Board pursuant to the broad powers granted it under Section 105 of the Act; the Federal Reserve Board Interpretations of Regulation Z, 12 C.F.R. §§ 226.201 *et seq.*; and the Federal Reserve Board's staff opinions, which explain the provisions of the three foregoing authorities, usually in answer to a query regarding a particular factual situation. *The three latter authorities, although not binding on the Court, are entitled to great weight, for they constitute part of the body of "informed experience and judgment of the agency to whom Congress delegated appropriate authority."* (499 F.2d at 976) (emphasis supplied)

Similarly, in *Bone v. Hibernia Bank, et al.*, 493 F.2d 135 (9th Cir. 1974) the court concluded that "great deference" is to be given to the Board's construction of the "complex requirements" of its own Regulation "because of the important interpretative and enforcement powers granted this agency by Congress under the Truth in Lending Act." (493 F.2d at 139).

It is the Board's position that "the public is entitled to rely on a formal staff opinion unless and until it is altered by the Board."[49] The Board relies heavily upon the staff's Public Information Letters in the administration of the Truth in Lending Act. Furthermore, it is clear that Congress intended (and the courts have consistently agreed) that the Board has great "flexibility [and] broad rulemaking authority" (*Mourning, supra*, at 372). The

[49]Public Information Letter no. 444; CCH, *Consumer Credit Guide*, Par. 30,640; Appendix, p. A-32.

Court of Appeals has recongized that authority in prior opinions (*e.g. Philbeck, supra*). This Court should confirm that authority in the case at bar and confirm that creditors must disclose the various rights pertinent to the Truth in Lending Act as *claimed* in the contract documents.

VII. CONCLUSION

The clear and unequivocal provisions of 12 C.F.R. § 226.8(d)(1) do not require itemization of the net cash proceeds of a loan paid to the borrower; several of the Board's Public Information Letters reiterate that such a disclosure need not be made. Both the Regulation and the staff opinions are entitled to great weight, because they resolve an internal statutory conflict which would have imposed an absurd compliance requirement, one at odds with the purpose of the Act. They should be controlling in the case at bar.

Similarly, the requirement regarding disclosure of a security interest in after-acquired property is imposed by Regulation Z, not the Truth in Lending Act. Accordingly, the Board's staff interpretations are entitled to particularly great deference in interpreting those requirements. Failure to accord them such deference has left in shambles the Board's ability to administer effectively the Act and Regulation Z. Those letters should have been controlling in the case at bar.

Since the security interest in consumer goods which secures future indebtedness is limited to such goods acquired within ten days after the secured party gives value, the Board's Public Information Letters relating to

the after-acquired property disclosure should also have been controlling in the case at bar.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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